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No. 91-1721

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER
OF THE ASSOCIATED GENERAL
CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and
ED AUSTIN, in his official capacity as
Mayor of the City of Jacksonville,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR
THE ELEVENTH CIRCUIT

RESPONDENTS', CITY OF JACKSONVILLE,
FLORIDA AND ED AUSTIN,
MOTION TO DISMISS AS MOOT

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BEST AVAILABLE COPY

LIST OF INTERESTED PARTIES

Only those parties listed in the caption were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit.[1] None of the parties has any parent companies or subsidiaries. Petitioner is affiliated with the Associated General Contractors of America, a non-profit corporation.

[1]Tommy Hazouri is no longer Mayor of the City of Jacksonville. Petitioner and Respondent have substituted the current Mayor, Ed Austin, in the caption of this case pursuant to Rule 35.3 of the Rules of the Supreme Court.

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CITY OF JACKSONVILLE, FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,
Respondents.

RESPONDENTS' CITY OF JACKSONVILLE AND ED AUSTIN, MOTION TO DISMISS AS MOOT

Respondents, City of Jacksonville, Florida and Ed Austin[2] (hereinafter the "City"), move to dismiss this appeal in accordance with Rule 21, Rules of the Supreme Court of the United States, on the ground that the challenged ordinance has been repealed, thereby

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[2]Tommy Hazouri is no longer Mayor of the City of Jacksonville. Petitioner and Respondent have substituted the current Mayor, Ed Austin, in the caption of this case pursuant to Rule 35.3 of the Rules of the Supreme Court.

rendering the appeal of this case moot. In support thereof the City further states as follows:

1. The case involves the Petitioner's, Northeastern Florida Chapter of the Associated General Contractors of America (hereinafter the "AGC"), constitutional challenge to the City's ordinance which provided affirmative action for minority businesses in city contracting. Appendix to the Petition for Writ of Certiorari, App. 14-27; Ordinance 83-1200-647, as amended by Ordinance 88-37-143. The AGC sought injunctive relief including a permanent injunction enjoining the City from further enforcing the ordinance. No award of damages was sought.

2. On October 27, 1992, the Jacksonville City Council enacted Ordinances 92-1269-1132 and 92-1464-1133.

Appendix to this Motion to Dismiss as Moot, A:4-76. Ordinance 92-1269-1132 expressly repealed Part 6, Chapter 126 of the Jacksonville Ordinance Code, that is, Ordinance 83-1200-647, as amended by Ordinance 88-37-143. A:6, Section 1. The Mayor approved the new ordinances on October 28, 1992. A:61, 76. These ordinances also promulgated a new affirmative action program exclusively for African-American and women business participation in city contracting.

3. The new ordinances are predicated upon *inter alia* an independent study commissioned by the City of Jacksonville, completed in November of 1990; numerous public hearings conducted by a Select Committee of the Jacksonville City Council, held during 1991-1992; and findings made by the Select Committee, on May 22, 1991, which were expressly adopted

by the City Council in the recent enactments. A:7-8, Section 126.601.

MEMORANDUM OF LAW

The recent repeal of the challenged ordinance by the Jacksonville City Council has rendered the appeal of this case moot. *New Orleans Flour Inspectors v. Glover*, 160 U.S. 170 (1895); *Berry v. Davis*, 242 U.S. 468, (1917); *Board of Public Utility Comrs. v. Compania General De Tabacos De Filipinas*, 249 U.S. 425 (1919); *Bryan v. Austin*, 354 U.S. 933 (1957); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972).

In the momentous case of *City of Richmond v. J. A. Croson Company*, 488 U.S. 469, 478, n.1 (1989), the Supreme Court held that the case was not moot even though the ordinance had expired in that there remained a live controversy between the parties over the issue of damages. In the present case, the AGC sought

injunctive relief. Unlike the *Croson* case, there was no claim for damages herein. The subsequent repeal of the ordinance has thus ended the live controversy between the parties.

The Court should dismiss the case in light of the law as it now stands, not as it stood when the judgment was entered. *Diffenderfer v. Central Baptist Church*, *supra* 404 U.S. 412, 414; *Roe v. Wade*, 410 U.S. 113, 125 (1973). As is its usual practice, the Supreme Court in *Diffenderfer* dismissed the case as moot because the relief sought in the complaint was no longer proper in view of the subject statute's repeal. As the Court stated: "The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract provisions of law." *Diffenderfer v.*

Central Baptist Church, *supra* 404 U.S. 412, 414, citing *Hall v. Beals*, 396 U.S. 45, 48 (1969).

In exceptional circumstances, an appeal is not rendered moot under the test of "capable of repetition, yet evading review". *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Under this exception, a case is not moot when the challenged action is in its duration too short to be fully litigated prior to its cessation and there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The present case does not fit into the narrow exceptions to the mootness doctrine carved out by this Court in that there is no reasonable likelihood that AGC will be subjected again to the repealed ordinance.

In the district court below, the AGC attacked the pre-*Croson* ordinance. It successfully moved for summary judgment on the ground that the repealed ordinance failed to conform to the requirements of the *Croson* case, because prior to the enactment, the City did not conduct a formal study as to the existence of discrimination within its jurisdiction.[1] The new ordinances do not lack this alleged deficiency. These post-*Croson* ordinances were developed in an extensive

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[1]Throughout the litigation, the City has and continues to contest this contemporaneous finding or formal study requirement which was imposed by the district court's reading of *City of Richmond v. J.A. Croson*, *supra*, 488 U.S. 469, because it flies squarely in the face of traditional legislative domain. Such a requirement that a certain type of legislative fact-finding precede any enactment is an unwarranted encroachment by the judiciary into the law-making process. Evidentiary support for an enactment should only become necessary when challenged in court. In any event, this controversy has been mooted by the City's repeal.

and time-consuming legislative process guided by the requirements of the Supreme Court's holding in *City of Richmond v. J. A. Croson*, *supra* 488 U.S. 469. They were enacted after numerous public hearings and an independent study conducted to ascertain whether a compelling state interest existed to support the proposed remedial relief. Accordingly, the AGC cannot be subjected again to the same alleged illegality occasioned by the circumstances surrounding the enactment of the repealed pre-*Croson* ordinance.

In addition, the new ordinances completely replace the old one. The City's new affirmative action program is a ten-year plan seeking to remedy the present effects of past discrimination against African Americans and women in the Jacksonville business community. A:58-59, Section 126.617. The repealed ordinance

provided remedial relief for additional minority groups which included Spanish-Speaking Americans, Orientals, Indians, Eskimos, Aleuts and the handicapped. Appendix to the Petition for Writ of Certiorari; App. 15, repealed Section 126.603. The new ordinances further provide, on a project by project basis, for five alternative approaches to achieving the program goals of dismantling racial and gender barriers existing in the local business community. A:20-30, 63-70, Sections 126.605(a)(b)(c)(d) and 126.618. The repealed ordinance set-aside up to ten percent of city contracting for all the above listed minority groups. App. 15-21, repealed Sections 126.604 and 126.605. Accordingly, the substantive changes between the repealed and new ordinances require that the mootness doctrine not be abandoned in this instance.

Moreover, the AGC seeks a ruling on the Writ of Certiorari as to whether the association had established standing to challenge the repealed ordinance by claiming that it denies the AGC an opportunity to compete for contracts.[4] However, this issue no longer presents a live controversy. Under the new ordinances, all bidders are unquestionably permitted to compete for city contracting under the five different alternative plans. A-:20-30, 63-70, Sections 126.605(a)(b)(c)(d) and 126.618. In particular, a non-certified contractor may compete as a certified African American or women contractor in a joint-venture enterprise relationship. A:25-29, 39-43,

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[4]The City maintains that the AGC failed to prove that the repealed ordinance necessarily precluded its members from receiving contracts and also failed to prove that there was a substantial probability that its members would receive contracts in the absence of the repealed ordinance.

Sections 126.605(b)(c)(d) and 126.609. In any event, the issue of the showing necessary for constitutional standing to challenge the new ordinances is not presently before this Court.

For this Court to decide the standing question, after the repeal of the ordinance, would be to adjudicate a purely hypothetical question because there no longer remains a viable controversy as to the repealed ordinance. Where the controversy becomes moot, it is the "duty" of the appellate court to ultimately dismiss the case. *Duke Power Co. v. Greenwood*, 299 U.S. 259, 267 (1936). Accordingly, the Court should refrain from issuing an advisory opinion on the issues of standing and/or validity of the repealed ordinance at this time.

CONCLUSION

Respondents', City of Jacksonville and Ed Austin, respectfully request an order dismissing the case as moot, and alternatively, in the event the motion is denied, grant to the City an enlargement of time to file the Respondents' brief on the merits.[5]

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[5]The undersigned counsel is well aware of the Office of the Clerk's Note in the Memorandum to Counsel in Cases Granted Review on October 5, 1992 that extensions of time to file briefs on the merits will not be entertained in this case. However, in view of the intervening repeal of the subject ordinance on October 28, 1992, the Respondents' request for an enlargement of time to file its brief, is in the interests of judicial economy and will control further time, expenses and costs in this matter. It should be noted that counsel of record for the AGC has been kept apprised of these developments.

Respectfully submitted,

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MOTION TO DISMISS AS MOOT

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ORDINANCE CERTIFICATION

I HEREBY CERTIFY that the following is a true and correct copy of Ordinance 92-1269-1132 and Ordinance 92-1464-1133, enacted by the Council of the City of Jacksonville, Florida, and a true and correct copy of a Certification relating thereto, which ordinances became effective at the time and in the manner set forth in the Certificate of Authentication.

WITNESS MY HAND and the Seal of the City of Jacksonville, Florida, this 16th day of November, 1992.

ATTEST:

Kathleen A. Roberts

KATHLEEN A. ROBERTS
Assistant Council Secretary
Legislative Records

CITY OF JACKSONVILLE FLORIDA

Council Member Jones' Substitute for File #92-1269:

AN ORDINANCE CONCERNING PURCHASING AND PROCUREMENT; REPEALING PART 6, CHAPTER 126, *ORDINANCE CODE*, AND ADDING A NEW PART CONCERNING AFRICAN-AMERICAN AND WOMEN'S BUSINESS ENTERPRISE PARTICIPATION TO BE KNOWN AS THE EQUAL BUSINESS OPPORTUNITY PROGRAM; MAKING LEGISLATIVE FINDINGS AND POLICY STATEMENT; PROVIDING FOR APPLICABILITY; PROVIDING DEFINITIONS; ESTABLISHING PARTICIPATION GOALS; ESTABLISHING ALTERNATIVE METHODS OF ACHIEVING GOALS PROVIDING FOR

CERTIFICATION OF AFRICAN-AMERICAN AND WOMEN'S BUSINESSES; PROVIDING FOR AFRICAN-AMERICAN AND WOMEN'S BUSINESS SUBCONTRACTORS; PROVIDING FOR PAYMENT OF SUBCONTRACTORS; PROVIDING FOR AFRICAN-AMERICAN AND WOMEN'S BUSINESS ENTERPRISE JOINT VENTURES; PROVIDING FOR GRADUATION FROM PARTICIPATION; PROVIDING FOR REVIEW OF CERTIFICATION; ESTABLISHING GOOD FAITH EFFORTS; PROVIDING FOR MONITORING; ESTABLISHING PENALTIES; PROVIDING THAT OTHER PROVISIONS OF THE PURCHASING CODE SHALL APPLY; ESTABLISHING POLICIES AND PROCEDURES FOR

IMPLEMENTATION OF THE EQUAL BUSINESS OPPORTUNITY PROGRAM, REPEAL AND SAVINGS CLAUSE; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. Repeal of existing Part 6, Chapter 126, Ordinance Code and adding a new Part 6, Chapter 126, Ordinance Code. Part 6, Chapter 126, Ordinance Code, is hereby repealed and a new Part 6, is added to Chapter 126, Ordinance Code, to read as follows:

Part 6. African-American and Women's Business Enterprise Participation.

126.601 Legislative Findings and Policy Statement.

(a) The findings made by the Select Committee on Minority Business Enterprise, after numerous public hearings, are hereby adopted by the Council. These findings, bearing the date of May 22, 1991 are on file with the Council Secretary and by reference are incorporated herein as if set out in their entirety.

(b) It is the policy of the City of Jacksonville to ensure the equitable participation of African-American and Women's Business Enterprises in providing capital improvements, supplies, services and

professional services to the City. The goal of this ordinance is to increase the use of African-American and Women's Business Enterprises to a level comparable with their availability. This ordinance is designed to remedy the present effects of past discrimination which have been demonstrated in the legislative findings adopted in s. 126.601. The Participation Goals established by this Part shall be used as guidelines and shall not be construed as a ceiling or floor to African-American and Women's Business Enterprise participation.

126.602 Applicability. This part shall apply to all contracts funded in whole or in part by City funds, regardless of the source or sources of other funds; provided that there shall be exempt from the requirements

of this part any contract with respect to which a requirement for African-American or Women's Business Enterprise participation is imposed by state or federal law or prohibited by state or federal law. The program established by this Part shall be known as the Equal Business Opportunity Program.

126.603 Definitions. As used in this Part the following terms shall have the following meanings:

(a) *African-American* means a person who has origins in the black racial groups of Africa, or considers and holds herself or himself out as a person having origins in the black racial groups of Africa.

(b) *African-American Business Enterprise* means a business which is

legitimately owned, operated and controlled by African-Americans, has suffered from the effects of past discrimination within the business community of the City of Jacksonville, and which has been certified as such under s. 126.606. Active participation in the business community of the City of Jacksonville creates a presumption that the applicant has suffered from the effects of past discrimination within such business community.

(c) *Black* has the meanings given to it by the United States Equal Employment Opportunity Commission in its rules defining and describing that term.

(d) *City* means the City of Jacksonville, and its participating user departments.

(e) *Chief* means the Chief of Procurement and Supplies.

(f) *Joint Venture Enterprise* means an association of two or more business enterprises acting as a contractor and performing or providing services on a contracting opportunity in which each joint venture partner combines property, capital, efforts, skills, and/or knowledge. The joint venture association should be limited in scope and duration.

(g) *Legitimately owned, operated and controlled* means ownership of at least fifty-one percent (51%) interest in the business enterprise. This ownership shall be real and continuing, and shall go beyond the pro forma ownership of the business enterprise reflected in the ownership

documents. The African-American or woman shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interest, as demonstrated by an examination of the substance, rather than the form of arrangements. The African-American or woman owner shall possess and exercise the legal power to direct the management and policies of the business and to make the day to day as well as major decisions on matters of management, policy and operations. If the owner of the business enterprise who is not an African-American or a woman is disproportionately responsible for the operation of the business enterprise, then the business enterprise is not controlled by an African-American or woman. The primary

consideration in determining legitimate ownership, operation and control of the business enterprise rests upon the nature of the industry which the business is engaged and is based upon control over management, interest in capital, interest in profit or loss and contributions to capital, equipment and expertise. For instance, in a required trade the license holder and qualifying agent shall be the African-American or woman applying for certification.

(h) *Participation Goals* means percentage objective for increasing participation of certified African American and Women's Business Enterprises for City contracting opportunities to a level comparable to their availability in the relevant market area and to remedy the

present effects of past discrimination.

(i) *User Department* means any of the departments of the City which participate in this chapter.

(j) *Women's Business Enterprise* means a business which is legitimately owned, operated and controlled by women, has suffered from the effects of past discrimination within the business community of the City of Jacksonville, and which has been certified as such under s. 126.606. Active participation in the business community of the City of Jacksonville creates a presumption that the applicant has suffered from the effects of past discrimination within such business community.

126.604. African-American and Women's Business Enterprise Participation Goals.

(a) The City hereby establishes the following African-American and Women's Business Enterprise participation policy goals with respect to the award of City contracts for ten (10) fiscal years commencing from the effective date of this ordinance:

(1) Participation Goals for capital improvements shall be eight percent (8%) African-American Business Enterprises, and five percent (5%) for Women's Business Enterprises.

(2) Participation Goals for contractual supplies shall be nine percent (9%) African-American Business Enterprises,

and nine percent (9%) for Women's Business Enterprises.

(3) Participation Goals for contractual services shall be nine percent (9%) African-American Business Enterprises, and nine percent (9%) for Women's Business Enterprises.

(4) Participation Goals for professional services shall be seven percent (7%) African-American Business Enterprises, and six percent (6%) for Women's Business Enterprises.

(b) The City hereby establishes the following African-American and Women's Business Enterprise Participation Goals with respect to the award of City contracts commencing from the effective date of this ordinance through and including City fiscal

year 1992-1993:

(1) Participation Goals for capital improvements shall be sixteen percent (16%) African-American Business Enterprises, and nine percent (9%) for Women's Business Enterprises.

(2) Participation Goals for contractual supplies shall be nine percent (9%) African-American Business Enterprises, and nine percent (9%) for Women's Business Enterprises.

(3) Participation Goals for contractual services shall be nine percent (9%) African-American Business Enterprises, and nine percent (9%) for Women's Business Enterprises.

(4) Participation Goals for professional services shall be seven percent

(7%) African-American Business Enterprises, and six percent (6%) for Women's Business Enterprises.

(c) These Participation Goals for African-American and Women's Business Enterprises in the different areas of contracting shall be separately met. The City shall make every effort to meet the established goals. The Participation Goals shall be used as guidelines and shall not be construed as a ceiling or floor to African-American and Women's Business Enterprise participation. Participation Goals shall be measured as a percentage of the total dollar value of a contract award. Accomplishment of the goals shall be calculated in the following manner:

(1) The dollar value of any and

all contracts awarded to African-American and Women's Business Enterprises excluding noncertified business enterprise subcontractors;

(2) The dollar value of any and all subcontracts awarded to African-American and Women's Business Enterprises; and

(3) The dollar value of any and all contract and subcontract awards attributable to African-American and Women's Business Enterprises in a joint venture enterprise.

(d) The Participation Goals shall be continually reviewed. The Chief shall recommend any adjustments, if necessary, to the City Council based upon consideration of the availability of certified African American and Women's Business Enterprises in

the relevant market area. There shall be a review by the City Council.

(e) All User Departments shall be responsible for meeting the Participation Goals, and through the Chief shall report to the City Council, pursuant to s. 126.613 as to the manner by which Participation Goals have been met.

Section 126.605. Alternative methods of achieving Participation Goals. After consideration of the availability of certified African American and Women's Business Enterprises in the relevant market area for each City contracting opportunity, the User Department, with the approval of the Chief, shall determine on a project by project basis the City's use of any of the following methods:

(1) The Participation Percentage Plan as set forth in subsection (a) herein.

(2) The Sheltered Market Plan as set forth in subsection (b) herein.

(3) The Direct Negotiation Plan as set forth in subsection (c) herein.

(4) The Bid Preference Plan as set forth in subsection (d) herein.

(a) Under the Participation Percentage Plan, the User Department, with the approval of the Chief, may set specific African American and/or Women's Business Enterprises participation percentages on a particular contracting opportunity. A contract shall be awarded to the lowest responsible bidder submitting a reasonable bid which meets the set participation percentages or to the lowest responsible bidder who has made a

good faith effort, as described in s. 126.612 to meet the set participation percentages. An African-American and Women's Business Enterprise bidder may meet the set participation percentages for the respective classifications by applying its dollar value excluding noncertified Business Enterprise subcontractors under the award.

(1) If a bidder is not able to meet the set African-American and Women's Business Enterprises participation percentages, then the bidder must demonstrate and document that a good faith effort, as described in s. 126.612, was made to meet the set participation percentages to be considered a responsive bidder.

(2) The Chief shall have the right to reject bids not meeting the set

African-American and Women's Business Enterprises participation percentages or which are submitted by bidders who fail to establish a good faith effort in the bid submission pursuant to s. 126.612.

(3) Prior to the advertising for bids or proposals, the User Department, may seek to modify or waive the established African-American and Women's Business Enterprises participation percentage on a bid-by-bid basis. The Chief shall make the determination to modify or waive the participation percentage on the basis of the following criteria:

(i) Any required goods, services or other contracting opportunity are available only from a sole or single source as stated in s. 126.212;

(ii) The User Department has certified in writing to the Chief that an emergency exists as stated in s. 126.201;

(iii)Available certified African-American and Women's Business Enterprises have given price quotations which are unreasonably high in that they exceed competitive levels which cannot be attributed to cover costs inflated by the effects of past discrimination.

(iv) The requirements of a particular contracting opportunity renders any subcontracting opportunities unfeasible.

(v) Compliance with the requirements of this Part would impose an unwarranted economic burden upon the City.

(vi) African-American and Women's Business Enterprises participation

is imposed by state or federal law or prohibited by state or federal law.

(vii) A User Department has attained its Participation Goals.

(viii) A User Department desires to use an alternative method of meeting Participation Goals; or

(ix) Certified African-American or Women's Business Enterprises are not available for a particular contracting opportunity.

(4) The Chief's determination to modify or waive the participation percentage shall be made in writing and shall be subject to review and approval by the Mayor's Budget Review Committee.

(b) Under the Sheltered Market Plan, the User Department, with the approval of

the Chief, may designate in the bid specifications its intent that certain City contracting opportunities be for the exclusive competition of certified African-American and Women's Business Enterprises consistent with the objectives of this Part. To promote effective competition, the Sheltered Market Plan may only be utilized where at least two (2) or more certified African-American or Women's Business Enterprises are available to perform the contract. The Sheltered Market Plan shall be used separately for certified African-American Business Enterprises or Women's Business Enterprises. Joint venture enterprises as described in s. 126.609, which include certified African-American or Women's Business Enterprises may participate

as certified African-American or Women's Business Enterprises under this section.

(c) Under the Direct Negotiation Plan, the User Department, with the approval of the Chief, may commence direct negotiations with certified African-American or Women's Business Enterprises in the award of professional services contracts, subject to the provisions of the Consultant's Competitive Negotiations Act. The Direct Negotiation Plan shall be utilized for professional services awards which are less than Fifty Thousand Dollars ($50,000). Joint venture enterprises, as described in s. 126.609, which include certified African-American or Women's Business Enterprises may participate as a certified African-American or Women's business Enterprise under this

section.

(d) Under the Bid Preference Plan, the User Department, with the approval of the Chief, may grant bid preferences of up to five percent (5%) and not more than Five Thousand Dollars ($5,000) to certified African-American and Women's Business Enterprises, if at the end of a fiscal year a Participation Goal has not been achieved. Use of the Bid Preference Plan shall be included in bid specifications. Once all bids are received under this Plan, the contract shall be awarded to the lowest responsible bidder or to the certified African-American or women's Business enterprise whose bid is within the percentage or dollar amount of the lowest responsible bid, as set out in the

specifications. Joint venture enterprises as described in s. 126.609\ which include certified African-American or Women's Business Enterprises, may participate as certified African-American or Women's Business Enterprises under this section.

(e) Notwithstanding the provisions of this Part or of any other ordinance to the contrary, the City retains and shall have the right to reject any and all bids or proposals, in whole or in part, for any reason, if such action is deemed to be in the best interest of the City. Additionally, the City reserves the right to waive any and all irregularities which do not provide an unfair advantage to bidders, and to solicit and evaluate exceptions to all bids and proposals submitted pursuant to

this Part.

126.606 Certification of African-American and Women's Business Enterprise. The following procedures shall apply in certifying African-American or Women's Business Enterprises, under this Part.

(a) The Chief shall institute a prequalification procedure to determine if an African-American or Women's Business Enterprise is qualified to bid and perform on City contracting opportunities under this Part.

(b) The Applicant must state in writing under oath that the applicant legitimately owns, operates and controls the business enterprise and that the applicant has suffered from the effects of past discrimination within the business community

of the City of Jacksonville and that the applicant is eligible pursuant to s. 126.610.

(c) The Chief shall make the determination as to the prequalification of African-American or Women's Business Enterprises being placed on the list of prequalified African-American or Women's Business Enterprises. This determination shall be based upon whether the business enterprise legitimately owned, operated and controlled by an African-American or a woman and has suffered from the effects of past discrimination within the business community of the City of Jacksonville and is eligible pursuant to s. 126.610. This determination should be made within a practicable period not to exceed 150 days.

(d) In the event the Chief determines that the applicant is not legitimately owned, operated and controlled by African-Americans or women, or has not suffered from the effects of past discrimination within the business community of the City of Jacksonville, or is not eligible pursuant to s. 126.610, a written denial notice and appeal form shall be sent to the last known mailing address provided by the applicant. The Chief shall indicate the reasons for noncertification and indicate that the applicant has fifteen (15) days from the date of the denial notice to appeal the decision. The applicant may appeal the decision concerning contracts for supplies, capital improvements and services other than professional services to the

Awards Committee. The applicant may appeal the decision concerning contracts for professional services to the Professional Services Evaluation Committee. The applicant shall have fifteen (15) days from the date of the denial notice to appeal the denial of certification to the Awards Committee or Professional Services Evaluation Committee. The applicant's appeal of the Chief's denial of certification shall be prepared on a form provided by the Chief and shall state specific reasons for reversing the decision of the Chief. The Awards Committee or Professional Services Evaluation Committee shall conduct a hearing to review the Chief's decision. The Chief shall have the authority to request the attendance of any

witnesses and production of any documents concerning the applicant's affairs. Failure to comply with these requests promptly may be grounds for denial of the appeal.

(e) If the status of a certified African-American and Women's Business Enterprise changes because of legitimate ownership, operation and control of the business enterprise, then it shall be the original applicant's responsibility to notify the Chief. Failure to report such changes within five (5) days of a change shall result in revocation of certification and other penalties specified in s. 126.614.

126.607. African-American and Women's Business Enterprise Subcontractors. The following procedures shall apply with respect to African-American or Women's

Business Enterprise subcontractors, subconsultants and suppliers:

(a) All bidders on City contracts must submit with their bids or proposals on forms provided by the Chief, the following:

(1) A list of the names of the certified African-American and Women's Business Enterprises to be utilized as subcontractors, subconsultants and suppliers;

(2) A letter or other written statement from each certified African-American and Women's Business Enterprise indicating an intent to perform as a subcontractor, subconsultant and supplier;

(3) A description of the work, materials, equipment or services to be

furnished by the certified African-American and Women's Business Enterprise subcontractor, subconsultant or supplier; and

(4) The agreed upon dollar value for such work, materials, equipment or services.

(b) A bidder or proposer receiving an award of a contract shall be responsible for maintaining the level of such certified African-American and Women's Business Enterprise participation designated on the bid submission for the duration of the contract.

(c) Any change of such designated participation after bid opening or receipt of proposals must be submitted to the Chief within five (5) days of the change. The

bidder, proposer or contractor must make a good faith effort, as described in s. 126.612, to replace the designated certified African-American and Women's Business Enterprise subcontractor with another certified African-American and Women's Business Enterprise. All substitutes for certified African-American and Women's Business Enterprise subcontractors require approval of the Chief.

(d) The bidder, proposer or contractor may appeal the Chief's determination in subsection (c) to the Mayor's Budget Review Committee. This appeal must be filed with the Chief within five (5) days from the date of the Chief's decision. The Mayor's Budget Review Committee shall conduct a hearing to review

the Chief's determination. The Chief shall have the authority to request attendance of any witnesses and production of any documents. The bidder's, proposer's or contractor's failure to comply with these requests promptly may be grounds for a denial of the appeal.

Section 126.608. Payment of Subcontractors. All contracts awarded with certified African-American and Women's Business Enterprise subcontractors shall require the prime contractor to pay all its certified African-American and Women's Business Enterprise subcontractors their pro-rata share of progress payments made by the City under the applicable contract. The pro-rata share shall be based on all work completed, materials and equipment furnished

or services performed by the certified African-American and Women's Business Enterprise subcontractors at the time of payment. The prime contractor shall obtain prior approval of the City for not making a payment to its certified African-American and Women's Business Enterprise subcontractors as required by thi provision. Failure to comply with the requirements of this section shall result in penalties as specified in s. 126.614.

126.609. African-American and Women's Business Enterprise Joint Ventures. The following procedures shall apply with respect to certified African-American and Women's Business Enterprise joint ventures:

(a) A joint venture shall be considered a certified African-American and

Women's Business Enterprise for purposes of the award of a contract when at least one joint venture partner is a certified African-American and Women's Business enterprise which has been properly certified pursuant s. 126.606. The certified African-American and Women's Business Enterprise joint venture partner shall be responsible for a clearly defined portion of the work to be performed, share in the ownership, control, management responsibilities, risks, and profits of the joint venture enterprise. The certified African-American and Women's Business Enterprise joint venture partner's portion of the contract must be assigned a commercially reasonable dollar value. The portion of the certified African-American and Women's Business Enterprise joint

venture partner's work, materials, equipment or services shall be set forth in detail from the work, materials, equipment or services to be furnished by the noncertified business enterprise joint venture partners. The certified African-American and Women's Business Enterprise joint venture partner business participation shall equal or exceed twenty-five percent (25%) of the total dollar value of the joint venture. The noncertified business enterprise joint venture partners shall set forth in detail the management, technical and entrepreneurial assistance and skills that they are providing the certified African-American or Women's Business Enterprise joint venture partner.

(b) A joint venture must submit

an application for approval prior to the bid opening or receipt of proposals for each project. The joint venture shall be certified by the same process as required for certification of African-American or Women's Business Enterprises as specified in s. 126.606. Joint venture certification shall be given only on a bid-by-bid basis.

(c) The Chief shall encourage certified African-American or Women's Business Enterprises and noncertified business enterprises to participate in joint venture opportunities. The Chief shall advertise and promote the benefits of the joint venture enterprise program. To achieve this objective, the Chief shall maintain lists of available certified African-American and Women's Business

Enterprises and noncertified business enterprises seeking to participate as joint ventures.

126.610. Graduation from Participation.

(a) A business which has been certified as an African-American or Women's Business Enterprise shall cease to be certified under s. 126.606 when its average annual gross receipts reach the following levels:

(1) For a general construction business in which average annual gross receipts for the preceding three (3) years from the time of its bid submission exceeds $3,000,000, per year.

(2) For a specialty construction business in which average

annual gross receipts for the preceding three (3) years from the time of its bid submission exceeds $1,000,000, per year.

(3) For a wholesale or retail business in which average annual gross receipts for the preceding three (3) years from the time of its bid submission exceeds $1,000,000, per year.

(4) For a service business other than professional services in which average annual gross receipts for the preceding three (3) years from the time of its bid submission exceeds $1,000,000, per year.

(5) For a professional service business in which average annual gross receipts for the preceding three (3) years from the time of its proposal

submission exceeds $2,000,000, per year.

(6) For a manufacturing business in which average annual gross receipts for the preceding three (3) years from the time of its bid submission exceeds $5,000,000, per year.

(b) This section shall only be applicable to business enterprises that have operated for the preceding three (3) years.

(c) It shall be the responsibility of the applicant for the African-American or Women's Business Enterprise certification to notify the Chief within five (5) days of its ineligibility, under this Part. A failure to provide such notification shall result in revocation of certification and the penalties specified in s. 126.614.

126.611. Review of certification. The following procedures shall apply to a periodic review of certification of African-American Business Enterprises, Women's Business Enterprises, and joint ventures:

(a) Upon the filing of an application for certification, the African-American Business Enterprises, Women's Business Enterprises and joint venture becomes subject to periodic interviews by the City, unannounced on site inspections of its facilities and projects by the City, and review of any documentation concerning its affairs as required by the City.

(b) Upon certification as an African-American Business Enterprise, Women's Business Enterprise and joint venture, the Chief may impose additional

requirements upon African-American Business Enterprises, Women's Business Enterprises and joint ventures including but not limited to mandatory attendance at conferences, seminars and other required technical assistance.

(c) Failure to comply with the requirements of this section shall result in revocation of certification and other penalties specified in s. 126.614.

126.612. Good Faith Efforts. Procedures for establishing good faith efforts to meet participation percentages as set forth in s. 126.605(a) shall be as follows:

(a) Any bidder submitting a bid or proposal which does not meet the set participation percentages must provide

documentation of its good faith efforts to meet the set participation percentages. Documentation of good faith efforts shall be submitted with the bid or proposal on forms provided by the Chief, in all bid and proposal documents, and shall include the following considerations:

(1) A written statement that the bidder or proposer attended all pre-bid conferences.

(2) Written notification sent by the bidder to a reasonable number of City certified African-American or Women's Business Enterprises that perform the type of work, materials, equipment or services sought to be subcontracted. This notification should solicit certified African-American or Women's Business

Enterprise participation and must be received by the certified African-American or Women's Business Enterprise seven (7) working days prior to the date of the bid opening or receipt of proposals in order to allow the certified African-American or Women's Business Enterprise to participate effectively.

(3) A written statement that subcontracting is not economically feasible for portions of work, materials, equipment or services to be furnished by certified African-American or Women's Business Enterprises including, where appropriate, segmenting elements of work, materials, equipment or services or combining elements into economically feasible units. The ability of the bidder to perform the work or

services with its own work force or supply materials or equipment from is own business will not excuse the bidder from making good faith efforts to meet the set participation percentages.

(4) A written statement of the bidder's efforts made to negotiate with certified African-American or Women's Business Enterprises, including:

(i) the names, addresses and telephone numbers of certified African-American or Women's Business Enterprises who were contacted;

(ii) the date negotiations took place;

(iii) a description of the information provided to certified African-American or Women's Business

Enterprises, regarding the plans, specifications and requirements for portions of the work or services to be performed or materials or equipment to be furnished.

(5) A written statement of the efforts made to assist certified African-American and Women's Business Enterprises contacted who need assistance in obtaining bonding, insurance, and financing.

(6) A written statement of the reasons for not accepting a certified African-American and Women's Business Enterprise on the project. Receipt of a lower quotation from a noncertified business enterprise will not excuse a bidder's failure to meet the set participation percentages.

(7) Documented outreach to

certified African-American and Women's Business Enterprises by utilizing local, state and federal business assistance offices.

(b) The Chief may waive or reduce the set participation percentages on a particular contracting opportunity when good faith efforts are demonstrated by the bidder. The Chief shall make the determination of whether a bidder has made good faith efforts. The bidder may appeal such determination concerning contracts for supplies, capital improvements and services to the Awards Committee. The proposer may appeal such determination concerning contracts for professional services to the Professional Services Evaluation Committee. This appeal must be filed with the Chief

within five (5) days from the date of the Chief 's decision. The respective Committee shall conduct a hearing to review the Chief's determination. The Chief shall have the authority to request attendance of any witnesses and production of any documents. The bidder's, proposer's or contractor's failure to comply with these requests promptly may be grounds for a denial of the appeal.

126.613. Monitoring. The Chief shall establish an Equal Business Opportunity Office to properly administer this Part. The Equal Business Opportunity Office, with assistance from user agencies, shall be responsible for coordinating the program, outreach and for providing technical assistance to the certified African-American

and Women's Business Enterprise. The Chief shall continually monitor the progress toward achievement of the Participation Goals established by this Part. The Chief shall report on a quarterly basis to the Mayor and the City Council, on the administration and operation of this Part specifically with reference to the breakdown of African-American and Women's Business Enterprise participation by each User Department, type of contract, number of contracts, dollar amount of contracts, and the manner in which participation was achieved. At the end of the fiscal year, if the User Department has not met the Participation Goals as set out in s. 126.604, then commencing with the next fiscal year, approval of further contracts

by the User Department must be obtained from the City Council.

126.614. Penalties.

(a) A bidder, proposer, contractor, joint venturer or applicant that has willfully failed to comply with any provision of this Part shall be liable for any or all or any combination of the following penalties:

(1) Ineligibility of a bid or proposal on the particular contracting opportunity;

(2) Withholding all payments under the particular contract from the contractor until it is determined that the contractor is in compliance;

(3) Termination of the contract;

(4) Exclusion from a contract award for any future City contracting opportunity until such time as the contractor demonstrates to the Chief that it will comply with the provisions of this Part; and/or

(5) If the contractor is certified as an African-American Business Enterprise, Women's Business Enterprise or joint venture, revocation of the certification as an African-American Business Enterprise, Women's Business Enterprise or joint venture;

(b) In addition to the penalties stated above, any bidder, proposer, contractor, joint venturer or applicant for African-American and Women's Business Enterprises certification who willfully

violates this Part, including, but not limited to making a misstatement in the bidding process concerning its status as an African-American and Women's Business Enterprise for the purpose of obtaining a contract, shall be guilty of a Class D offense and shall be liable for a civil penalty in an amount not to exceed Ten Thousand Dollars ($10,000). Such civil penalties shall be collected in an appropriate judicial proceeding in a court of competent jurisdiction.

126.615. Other Provisions of Purchasing Code to Apply. Except as provided in this Part to implement the Equal Business Opportunity Program, the provisions of Parts 1, 2, 3 and 4, Chapter 126, apply. The Chief shall establish rules which

specify the manner in which conflicts between the provisions of Parts 1, 2, 3 or 4 and this Chapter are to be resolved.

126.616. Policies and Procedures for Implementation of Equal Business Opportunity Program. The Chief and the Equal Business Opportunity Office shall prepare for approval by the Mayor policies and procedures regarding implementation and application of the Equal Business Opportunity Program. These policies and procedures shall be applied in their entirety by the Chief and the Equal Business Opportunity Office in the implementation and administration of the Equal Business Opportunity Program.

126.617. Length of Participation, Repeal, Saving Clause. The Equal Business

Opportunity Program created by this Part shall remain in effect for ten (10) years. Thereafter, this Part and the Equal Business Opportunity Program established hereby shall terminate and shall be repealed and of no further force and effect, unless prior to that date action is taken to extend this Part.

Section 2. Severability. If any part, section, paragraph, sentence, clause, phrase or word of this ordinance is for any reason held or declared to be unconstitutional, November 12, 1992 inoperative, invalid or void, such holding shall not affect the remaining portion of this ordinance; and it shall be construed to have been the legislative intent to pass this ordinance without such unconstitutional, invalid, void

or inoperative portion or portions therein; and the remainder of this ordinance, after exclusion of such unconstitutional, invalid or inoperative portion or portions, shall be deemed and held to be valid as if such unconstitutional, invalid, void or inoperative portion or portions had not been included therein.

Section 3. Effective Date. This ordinance shall become effective upon signature by the Mayor or upon becoming effective without the Mayor's signature.

Form Approved:

Assistant General Counsel
lsm:mlr:10/23/92

ORDINANCE 92-1269-113

CERTIFICATE OF AUTHENTICATION

ENACTED BY THE COUNCIL

October 27, 1992

WARREN A. JONES
COUNCIL PRESIDENT

ATTEST:

BEVERLY S. DOMEN
SECRETARY TO THE COUNCIL

APPROVED
October 28, 1992

ED AUSTIN, MAYOR

Council Members Reagan, Carlucci, Crescimbeni, Davis, Brown, Leggett, Jones and Wood offer the following substitute to File #92-1464:

ORDINANCE 92-1464-1133

AN ORDINANCE CONCERNING MINORITY BUSINESS ENTERPRISE; AMENDING PART 6 OF CHAPTER 126, ORDINANCE CODE; CREATING A NEW SECTION 126.618, ORDINANCE CODE; PERMITTING THE CITY TO USE THE IMPACT PLAN; CREATING A NEW SECTION 126.619, ORDINANCE CODE, CONCERNING TECHNICAL ASSISTANCE; CREATING A NEW SECTION 126.620, ORDINANCE CODE, ESTABLISHING AN EQUAL BUSINESS OPPORTUNITY ADVISORY COMMITTEE; CREATING A

NEW SECTION 126.621, ORDINANCE CODE, DEFINING DUTIES OF ADVISORY COMMITTEE; CREATING A NEW SECTION 126.622, ORDINANCE CODE, CONCERNING INVALIDITY OF VARIOUS PROVISIONS; PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. A new Section 126.618, Ordinance Code, is hereby created to read as follows:

126.618. Impact Plan. In addition, to the plans set forth in s. 126.605, the User Department, with the approval of the Chief, may use the Impact Plan in order to meet the Participation Goals set forth in s. 126.604.

In order to develop a record as to how this Part meets the Participation Goals, the City shall use s. 126.605. The Mayor shall report to the Council in accordance with s.126.613. In the event the Impact Plan is declared invalid or unenforceable, the remainder of this Part shall remain in full force and effect.

(1) Under the Impact Plan, in the areas of capital improvements, supplies and contractual services, the Impact Plan shall operate in the same manner as an evaluated bid using an Impact Proposal which shall be evaluated by a matrix which assigns weighted point values for the following impact criteria:

(A) Participation of Certified African-American or Women's Business

Enterprises as proposers or bidders on City projects; Participation of Joint ventures with certified African-American or Women's Business Enterprises as proposers or bidders on City projects;

(B) Use of certified African-American or Women's Business Enterprise subcontractors, or subconsultants;

(C) Use of certified African-American or Women's Business Enterprise suppliers;

(D) Use of African-American or Women employees and/or affirmative action programs for African-American and Women employees;

(E) Use of apprenticeship and training programs for African-Americans or Women employees;

(F) Use of technical assistance, business related opportunities and economic assistance programs for certified African-American and Women's Business Enterprises;

(G) Impact on economically disadvantaged target areas; and/or

(H) Any other factors which contribute to a positive impact on African-American or Women Business Enterprises or employees.

(2) Except for professional services, after a bidder's Impact Proposal is evaluated, the total score derived from the Impact Proposal shall be divided into the sealed bid price to obtain a value cost for each bid. The bid price of all bidders shall remain in their individual sealed envelopes until such time as the above

criteria have been evaluated, for all such bidders.

(3) Under the Impact Plan, in the area of professional services, the score from a proposer's Impact Proposal shall be evaluated using the above specified impact criteria and that total score for each proposal shall be added to the score of the proposers from the ten professional service evaluation criteria matrix, as provided in s. 126.302 and the combination of the two shall constitute the basis for ranking the numerical order of those best qualified proposers.

(4) In the event the Impact Plan is not achieving the Participation Goals, then the Chief may adjust the relative weighted point values for each of the impact

criteria.

(5) (A) Evaluations for the Impact Plan created by this Part shall be performed by a committee composed of a representative or designee from each of the following: The Department of Administration and Finance, the Economic Development Division and the Equal Employment Opportunity Coordinator. The representative from the Department of Administration and Finance shall chair the committee. The committee shall evaluate all bids or proposals using the above specified criteria and shall, in the case of bids, determine and recommend to the Awards Committee the lowest and best responsive and responsible evaluated bid. In the case of professional services, the evaluation shall be forwarded to the Professional Services

Evaluation Committee for factoring into the selection process.

(B) All meetings of the the committee shall be governed by Section 286.011, Florida Statutes, and the committee shall keep official written minutes of its meetings, which shall be maintained on file in the Office of the Equal Employment Opportunity Coordinator, as permanent public records.

(C) The committee shall cause written notice of the date, time, place and purpose of its meetings to be posted at least twenty-four hours in advance of such meetings. A true and correct copy of such notice shall be retained on file, in the Office of the Equal Employment Opportunity Coordinator, as a permanent public record.

(6) Under the Impact Plan, the Chief shall have the right to reject any and all bids or proposals in which the total price exceeds fifteen percent (15%) of the total price of the lowest responsive, responsible bid or proposal.

Section 2. A new Section 126.619, Ordinance Code, is hereby created to read as follows:

126.619. Technical assistance.

(a) The Equal Business Opportunity Office, with assistance from the User Departments, shall be responsible for coordinating the Program outreach and any technical assistance offered to certified African-American and Women's Business Enterprises.

(b) In providing for technical

assistance, the Equal Business Opportunity Office may utilize and make available to certified African-American and Women's Business Enterprises, services from various organizations which promote economic development, such as: University of North Florida Small Business Development Center, Florida Community College at Jacksonville's Urban Resource Center, Edward Waters College, Jacksonville Economic Development Corporation, First Coast Black Business Investment Corporation, Jacksonville Minority Business Development Center, Private Industry Council. Use of the above specified organizations is given as an example and not as an intent to contract with any such organization.

Section 3. A new Section 126.620,

Ordinance Code is hereby created to read as follows:

126.620. Establishment of Equal Business Opportunity Advisory Committee. There is hereby established an Equal Business Opportunity Advisory Committee. The Advisory Committee shall be composed of five (5) private citizens. Members of the Advisory Committee shall be appointed by the Mayor with the approval from the City Council and shall serve two (2) year terms with no compensation. No member of the Advisory Committee shall either individually, or as a partner in a partnership, or shareholder or officer in a corporate entity conduct any business with the City of Jacksonville and its independent agencies. The restriction on shareholders

shall not apply to shareholders of shares traded on any national stock exchange. The members of the Advisory Committee shall elect a member of the Advisory Committee to serve as chairperson for a term of one (1) year with new elections on an annual basis. No member shall serve as chairperson for two (2) consecutive terms. All meetings of the Advisory Committee shall be public meetings governed by Section 286.011, Florida Statutes. Written minutes of all meetings shall be kept as an official public record in the Office of the Coordinator. The Advisory Committee shall meet at least monthly.

Section 4. A new Section 126.621, Ordinance Code is hereby created to read as follows:

126.621. Duties of the Equal Business Opportunity Advisory Committee. The Equal Business Opportunity Advisory Committee shall review the implementation of the Equal Business Opportunity program and make recommendations to the Mayor and City Council for achieving the objectives of this Part.

Section 5. A new Section 126.622, Ordinance Code is hereby created to read as follows:

126.622 Invalidity. In the event that a court of competent jurisdiction declares s. 126.605 and s. 126.618, in their entirety, to be unconstitutional, invalid or otherwise unenforceable, or enjoins the use of s. 126.605 and s. 126.618, in their entirety, then the City Council must

thereafter approve all contracts except those issued pursuant to s.126.203.

Section 6. Effective Date. This ordinance shall become effective upon signature by the Mayor or upon becoming effective without the Mayor's signature; provided however, this ordinance shall not become effective unless City Council File #92-1269 becomes effective.

Form Approved:

_____
Assistant General Counsel
10/27/92 reagan4.mbe - rmp

ORDINANCE 92-1464-1133

CERTIFICATE OF AUTHENTICATION

ENACTED BY THE COUNCIL

October 27, 1992

WARREN A. JONES
COUNCIL PRESIDENT

ATTEST:

BEVERLY S. DOMEN
SECRETARY TO THE COUNCIL

APPROVED

ED AUSTIN, MAYOR